TEOH KIM SENG

v.

HASSAN MOHAMAD & ANOR.

SUPREME COURT, KUALA LUMPUR
ABDUL HAMID OMAR CJ (MALAYA)
LEE HUN HOE CJ (BORNEO)
HASHIM YEOP SANI SCJ
[CIVIL APPEAL NO. 323 OF 1986]
27 JANUARY 1987

TORT: *Damages - Quantum - Loss of expectation of life - Loss of earnings on the "lost years" - Court to make estimate based on material known facts - Civil Law Act 1956 - Section 8(2)(c).*

This was an appeal to determine whether damages awarded were based on established principles of law. The learned Judge had made the following award of damages - (i) RM1,500 as special damages as agreed; (ii) RM4,000 for loss of expectation of life and (ii) RM14,954.65 for loss of earnings in the lost years under s. 8(2)(c) of the Civil Law Act 1956. The narrow point taken on this appeal was whether the learned Judge was correct in law in making the award for the "lost years".

Held:

[1] It would be a misconception to enter into speculation and guess-work in assessing the deceased's estimated loss of future earnings in respect to the lost years.

[2] The quantum of damages in respect of the lost years was not based on any material evidence before the trial Court and thus the appeal against this item of damages was allowed with costs.

[3] On the award of RM4,000 for loss of expectation of life made by the learned Judge, Their Lordships were of the view that RM6,000 would be a more reasonable figure for this item.

Cases referred to:

Lee Sai Cheong v. Wan Lim Cheong [1962] MLJ 259
Benham v. Gambling [1941] AC 147
Gammel v. Wilson; and Furness v. B & S Massey Ltd. [1981] 1 All ER 578
Pickett v. British Rail Engineering Ltd. [1979] 1 All ER 774

Legislation referred to:

Civil Law Act 1956, s. 8(2)(c)
Law Reform (Miscellaneous Provisions) Act 1934 [UK], s. 1(2)(c)

For the appellant - Manjit Singh; M/s. Sri Ram, Zulkifly & Kumar
For the respondents - Brijnandan Singh Bhar; M/s. Brijnandan Singh Bhar & Co.

JUDGMENT

Hashim Yeop Sani SCJ:

This is a running down case. The deceased was 12 years old at the time of accident. The learned Judge made the following award of damages:

Special damages as agreed	RM1,500.00
Damages for loss of expectation of life	4,000.00
Damages for loss of earnings in the lost years under s. 8(2)(c)	14,954.65

The Civil Law Act was amended in 1984 and the amendment to s. 8 of the Act excluded from the application of that section damages for bereavement under the dependency claim, damages for loss of expectation of life and damages for loss of earnings in respect of any period after the person's death. Since the deceased died in 1981 the amendment does not apply to this case.

In the instant case evidence disclosed that the deceased used to assist the father selling fish at an unlicensed stall outside the central market in Alor Setar during school holidays and during weekends. The father said that he paid the deceased RM32 per month. But the learned Judge also accepted the other part of the father's evidence and said in his judgment as follows:

> In fact the assistance was redundant so to speak. The more important thing to note is that the sum of RM32 per month given by the first plaintiff to the deceased was not for the assistance rendered by him but for his pocket expenses as admitted by the first plaintiff under cross-examination.

Then the learned Judge cited *Lee Sai Cheong v. Wan Lim Cheong* [1962] MLJ 259 as a case "on all fours" with the instant case. The learned Judge assessed RM180 per month as a reasonable sum as income of the deceased and deducted RM80 thereby leaving RM100 as monthly saving (p. 21). Using a multiplier of 20 years the learned Judge then made an award of RM14,954.65 as damages under s. 8(2)(c) of the Civil Law Act. A narrow point is taken on this appeal, that is, whether the learned Judge was correct in law in making the award for the "lost years".

In *Lee Sai Cheong* the damages awarded by the trial Judge were-

Special damages	...	RM 783
Damages for loss of expectation of life	...	RM5,000
Damages for loss of services	...	Nil

The trial Judge in *Lee Sai Cheong* relied on *Benham v. Gambling* [1941] AC 147 especially that part of the speech of Viscount Simon on the fixing of reasonable figure and his conclusion that in assessing damages under this head whether in the case of a child or an adult "very moderate figures" should be chosen. The Federal Court dismissed the appeal.

The learned Judge in our case relied on *Lee Sai Cheong* but made an award of RM4,000 for loss of expectation of life. We are of the view that RM6,000 would be a more reasonable figure for this item.

In *Gammel v. Wilson*; and *Furness v. B & S Massey Ltd.* [1981] 1 All ER 578 Lord Diplock when dealing with s. 1(2)(c) of the Law Reform (Miscellaneous Provisions) Act 1934 which is in *pari materia* with s. 8(2)(c) of our Civil Law Act said at p. 581:

> Where the deceased is as young as in these two cases (15 and 22 years respectively) the law requires the Judge to indulge in what can be no better than the merest speculation about what might have happened to the deceased during a normal working lifespan if he had not been prematurely killed.

His Lordship also noted that the logic on compensatory basis for loss of expectation of life vanished with the decision in *Benham v. Gambling.*

As regards the claim for loss of earnings during the "lost years" the principle to be followed by this Court was enunciated in *Abdul Malek bin Hassan's* case (Supreme Court Civil Appeal No. 413 of 1985). There the trial Judge had dismissed the claim for the "lost years" on the grounds that in his view since the deceased being a schoolboy (17½ years old) and not having earned any income at all the Judge felt that the claim for the "lost years" in the circumstances would be misconceived. The trial Judge considered *Pickett v. British Rail Engineering Ltd.* [1979] 1 All ER 774 and also *Gammel v. Wilson*. In *Abdul Malek* this Court ruled that unless the plaintiff can adduce evidence to satisfy the Court that at the date of the death of the deceased there was some material on which an assessment can properly be made the Judge should refrain from entering into speculation or guess-work in assessing the deceased's estimated loss of future earnings in respect of the "lost years". This is in line with what Lord Scarmam said in *Gammel* that the Judge must make the best estimate based on the **known facts** and his prospects at the time of death.

In *Pickett* the widow appealed to the House of Lords against the Court's refusal to give an award. Lord Salmon in his speech said at p. 153:

> Damages for the loss of earnings during the "lost years" should be assessed justly and with moderation. There can be no question of these damages being fixed at any contentional figure because damages for pecuniary loss,unlike damages for pain and suffering, can be naturally measured in money. The amount awarded will depend upon the fact of each particular case. They may vary greatly from case to case. At one end of the scale, the claim may be made on behalf of a young child or his estate. In such a case, the lost earnings are so unpredictable and speculative that only a minimal sum could properly be awarded. At the other end of the scale, the claim may be made by a man in the prime of life or, if he dies, on behalf of his estate; if he has been in good employment for years with every prospect of continuing to earn a good living until he reaches the age of retirement, after all the relevant factors have been taken into account, the damages recoverable from the defendant are likely to be substantial.

In the present case there was in our view in fact no material on which a proper assessment could be made. In *Gammel* the deceased was 15 years old at the time of accident. **Lord Scarman** said at page 593:

> If sufficient facts are established to enable the Court to avoid the fancies of speculation, even though not enabling it to reach mathematical certainty, the Court must make the best estimate it can. In civil litigation it is the balance of probabilities which matters. In the case of a young child, the lost years of earning capacity will ordinarily be so distant that assessmentis mere speculation. No estimate being posible, no award, not even a 'conventional' award, should ordinarily be made. Even so, there will be exceptions: a child television star, cut short in her prime at the age of five, might have claim; it would depend on the evidence.

In the instant case apart from the evidence that the deceased assisted the father at his fish stall there is no other evidence which can form as material for a reasonable assessment. No doubt the Court is allowed to speculate to some extent but not just to have a figure "plucked from the air" (to use the words of Counsel for the appellant here) without having some material on which to make the assessment. In the case the learned Judge arrived at a figure of $180 per month as his assessment of the probable income of the deceased. We feel that figure was not based on any material put before him.

We are of the view of that the appeal against this item of the damages should accordingly be allowed with costs. Order accordingly.

Also found at [1987] 2 CLJ 205